No. 82-702

Supreme Court, U.S.
FILED
NOV 18 1983
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In The

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T.H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
Table of Authorities	*ii*
Summary of Argument	1
Argument	5
POINT I — Grove City conducts no program or activity receiving federal financial assistance	5
POINT II — The government's interpretation of Title IX violates the statute's program-specific requirement	11
POINT III — The Assurance of Compliance may not be saved by now interpreting it in a program-specific manner	13
POINT IV — Federal funds may not be terminated absent a finding of actual discrimination	15
CONCLUSION	17

TABLE OF AUTHORITIES

Page

Cases:

Boara of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) 12

Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975) 5

Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968) 15

Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), *pet. for cert. pending*, No. 82-1538 11

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) 3, 4

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 14

Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982) 12

Statutes:

Basic Educational Opportunity Grant Program

20 U.S.C. § 1070a ..... *passim*

Civil Rights Acts of 1964, Title VI,

42 U.S.C. §§ 2000d *et seq.* ..... *passim*

Education Amendments of 1972, Title IX

20 U.S.C. § 1681 *et seq.* ..... *passim*

20 U.S.C. § 1682 ..... *passim*

20 U.S.C. §§ 236-44 12

20 U.S.C. § 1088(c) 9

Legislative Mat Material:

Letter fro from Attorney General Robert Kennedy to Senat enator John Sherman Cooper (April 29, 1964), 110 Co Cong. Rec. 10076 (1964) 6

1' 110 Cong. Rec. 9084 (1964) 5

110 Cong. Rec. 10076 (1964) 9

117 Cong. Rec. 30408 (1971) 11

Regulations:

34 C.F.R. § 100.13 (i) (1982) 8

34 C.F.R. §§ 106.2(g)(2) and (4) (1982). 9

34 C.F.R. § 106.2(h) (1982) 8

34 C.F.R. §§ 690.51, 690.53 (1982). 7

Law Review Articles:

Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof,'" 78 *Mich L. Review* 608 (1980) 8

Other Authorities:

R. Cappalli, *Federal Grants & Cooperative Agreements*, § 19:36 (1982). 5

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REPLY BRIEF FOR PETITIONERS

Summary of Argument

This case is not an attack on Title IX or on non-discrimination principles generally. Rather, Grove City College is challenging the Department's[1] extraordinary expansion of Title IX in ways not authorized nor contemplated by Congress.

Upholding Grove City's position — that it may exist independent of government regulation if it chooses not to accept

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[1] As in previous briefs, "Department" refers to both the Department of Education and its predecessor, the Department of Health, Education & Welfare.

any loans or grants from either the state or federal government — is essential to preserve the distinction Congress drew when it enacted Title IX. If a college accepts state or federal funds, it can anticipate government regulation. If it refuses to participate in federal programs, then it can expect to be free from unwarranted regulatory intrusion. Grove City's challenge raises fundamental questions of governmental limitations, Congressional intent, and educational policy.

Contrary to the claims of some amici, the future of the government's non-discrimination policy does not depend on the outcome of this case. Indeed, it is only by accident that this issue arises in the context of a non-discrimination statute. Grove City supports the aims of Title IX, but strongly objects to the Department's assertion that one student's receipt of a single federal dollar subjects the College to regulatory control. The College values its autonomy and independence. It believes that its ability to offer high quality education, to operate efficiently, and ultimately, to remain independent will be threatened if it concedes that aid to a student equals aid to the institution. In enacting Title IX, Congress recognized that the very few colleges willing and able to operate as Grove City operates should have the opportunity to avoid regulation without depriving needy students of the opportunity to attend such institutions. Grove City seeks only to preserve the limits already encompassed in the statute, limits that the Department is improperly attempting to expand.

When Grove City was confronted with the Department's threat to its autonomy, it raised two core objections to the broad assertion of regulatory jurisdiction contained in the Department's Assurance of Compliance (A 124). The College first asserted that it did not receive federal financial assistance and hence was not subject to Title IX jurisdiction. Alternatively, it argued that because Title IX must be interpreted in a program-specific manner, the Department's attempt to impose institution-wide obligations upon it was contrary to the

statute's requirement of program-specificity recognized by this Court in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

If this Court determines that Grove City is not a recipient of federal financial assistance, then it will be unnecessary to decide the breadth of coverage under Title IX. If, however, this Court concludes that the College is a recipient of federal financial assistance, it will need to determine the extent to which the College is to be regulated, i.e., what Congress meant by "program or activity."

Until this point in the case, the government has maintained that such a determination was not necessary. However, in its brief on the merits to this Court, the government has finally agreed that if its interpretation of recipient is adopted, this Court must decide what "program or activity" means.

More significantly, the government has now also tried to modify its interpretation of Title IX and to disavow the institution-wide interpretation of Title IX long advanced by the Department and adopted by the Third Circuit in this case. The government admits that heretofore the Department "gave a more expansive view of the scope of the Title IX regulations than is now justified . . ." (Govt. Br. at 42). This confession of error itself requires reversal of the Third Circuit's judgment, which took an institution-wide view of Title IX and terminated students' funds solely because Grove City refused to sign an Assurance which was institution-wide in scope. The government now advances the extraordinary proposition that even though Grove City correctly challenged the Assurance's overbreadth, its students nonetheless should suffer termination of their individual grants because a revised, retroactive "correct" interpretation can save the Assurance and thus the funds-termination penalty imposed on the College and its students. This Catch-22 reasoning completely ignores logic and fairness.

But, even if the government could be permitted to make this eleventh hour revision, its new interpretation of Title IX is little better than the old. Disavowing its prior institution-wide approach, the government argues that only Grove City's financial aid program is subject to Title IX regulation, despite the fact that neither that program nor any other program at the College receives federal monies, chooses students who receive federal assistance, or determines amounts of federal awards. Because students *may* spend their federal grants at the College, the government claims that the College's financial aid program is "assisted" by federal funds.

While pretending loyalty to the statute's program-specific requirement, this argument is still another attempt to urge that Congress should not have rejected the institution-wide approach to Title IX. *See* Pet. Br. at 22-23; *North Haven Board of Education v. Bell*, 456 U.S. 512, 537-38 (1982). In all respects, however, the new argument remains a strained interpretation of statutory language which is supported by neither the text, nor the legislative history, nor the purposes of the student aid program at issue here.

Grove City does not seek to overturn the original conception of Title IX nor to limit its enforcement. Title IX does not authorize regulation of a college solely because some of its students receive individual federal grants. Nor does Title IX authorize termination of those grants where the institution which the students attend has never even been accused of discrimination. The Department has erroneously tried to overreach here. Grove City is attempting to operate without government support, in a cost effective manner, offering high quality programs, without discriminating in any way. Congress did not intend to threaten Grove City's ability to operate in the manner it does; this Court should, therefore, make certain that the Department is not permitted to regulate this College in violation of the limits contained in Title IX.

Argument

POINT I

Grove City conducts no program or activity receiving federal financial assistance.

Starting with Title IX's statutory language, as it must, the government's argument depends on the premise that Grove City's financial aid program is "assisted" by grants paid by the Department directly to students. Relying on *Bob Jones University v. Johnson*, 396 F. Supp. 597, 602 (D.S.C. 1974), *aff'd without opinion*, 529 F.2d 514 (4th Cir. 1975), the government contends that the statutory language requires only "assistance" to an educational program or activity for Title IX to apply. Govt. Br. at 12-13. While this interpretation would have merit if Congress had enacted language that prohibited discrimination in any program or activity "benefited or assisted" by the federal government, Congress required that the program or activity *receive* federal financial assistance before Title IX would apply.

Congress rejected language that would have allowed indirect, attenuated "assistance" to bring an educational institution within the scope of Title IX. The concept of jurisdiction hinging upon "assistance," a reformulation of the benefit theory (*See* Pet. Br. at 16, n. 15), would lead to Title IX coverage over all programs or activities at every educational institution in the country, as all may be said to be "assisted" by federal dollars, however indirectly. Opponents of Title IX's model, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* ("Title VI"), focused on this potentially expansive reading of "receiving Federal financial assistance" in their attempt to defeat Title VI. *See* 110 Cong. Rec. 9084 (1964) (Sen. Gore); 3 R. Cappalli, *Federal Grants & Cooperative Agreements* §19:36 (1982). The sponsors of Title VI argued in defense of the statutory language that the phrase "receiving Federal financial assistance" was to be interpreted

more narrowly; a recipient was defined as "the person or entity to whom a federal grant or loan is made, or with whom a federal assistance contract is entered into." *See* Letter from Attorney General Robert Kennedy to Senator John Sherman Cooper (April 29, 1964), 110 Cong. Rec. 10076 (1964). The Attorney General's statement confirms that Title VI was transformed from a statute encompassing "direct and indirect" assistance to one requiring direct receipt of assistance by a program or activity. *See* Pet. Br. at 29-30. Since the authors of Title IX deliberately adopted the language of Title VI and incorporated its standards, the same definitions of receiving federal financial assistance should be used when interpreting Title IX. *See* Pet. Br. at 28.

Grove City's programs or activities receive no federal assistance. The government grants at issue here are made directly to students. Further, Grove City has not consented to any relationship with the government which would constitute a federal assistance contract.

On the contrary, Grove City consistently refused to participate in the BEOG program, but, at the specific request of the Department, consented to maintain for the convenience of the government those forms necessary for students to seek federal grants directly from the Department. (JA 30).[2] Students chosen by the federal government to receive federal grants receive their checks directly from the government under the Alternate Disbursement System, a system devised to provide institutions like Grove City with a means to avoid federal entanglement. Students can use these grants for any educational expenses, not necessarily for charges levied by the College.

Faced with these facts, the government relies on an economic benefit argument to try to bring Grove City within the reach of

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[2]First-year or prospective students receive forms from other sources.

Title IX. It argues that all student assistance, however administered, has the effect of a subsidy for educational institutions. While correctly perceiving that any government entitlement program necessarily has economic effects beyond those direct beneficiaries of the program, this argument ignores the structure of the BEOG program and the deliberate choice Congress made to create *student* assistance, as opposed to institutional assistance.[3] Student assistance funds need not even be spent at an educational institution. Under current regulations, up to $1,500 of a BEOG award may be spent with off-campus vendors for room, board, books, supplies, and "miscellaneous expenses." *See* 34 C.F.R. §§690.51, 690.53 (1982). The Court should therefore reject the misleading conclusion that BEOG awards automatically flow through the student to the educational institution, a position which would change the status of the student to an intermediate financial conduit rather than the intended beneficiary of the grant.[4] In

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[3]The fact that BEOG awards are limited by the costs of the institution a student chooses to attend fails to prove that BEOGs were intended as assistance to that institution's financial aid program. Rather, because BEOGs are designed to foster students' free choice and are treated "as an individual matter" (Pet. Br. at 27), the "cost of attendance" regulations upon which the government relies are designed to reflect the sensible policy that the government should give students no more than is necessary for them to attend the college of their choice.

[4]The government emphasizes Grove City's acknowledgement that assistance that is "extended" through another recipient to an educational program or activity is within the scope of Title IX coverage. (Govt. Br. at 12-13). It further contends that no distinction can be drawn between funds which are passed on to intended beneficiaries by a state agency or educational institution and funds that may be spent by students who receive direct federal grants. *(Id).* Together with the clear common sense distinction that can be drawn between these two routes by which government funds can be traced to a college or university, a principled legal distinction can be made between the two situations — a distinction which Congress drew. In a

Footnote continued on next page—

fact, given the small amount of the typical BEOG award[5] and the spending discretion allowed individual BEOG recipients, many BEOG awards never find their way into college treasuries.

Even if an award does reach a college like Grove City, it does so only through a market exchange for educational services. It strains reason to equate that exchange, as the government does, with direct grants to the educational institution. The transaction that takes place when students exchange their dollars, however obtained, for tuition or institutional services is far different from the transaction that occurs when the government

—*Footnote continued from preceding page*

financial aid program such as the BEOG, students are the ultimate beneficiaries of the federal assistance. Under Title VI, the model for Title IX, Congress did not intend to regulate the activities of individual beneficiaries (Pet. Br. at 29-31). It thus distinguished between beneficiaries and intermediate recipients, entities with control over the expenditure or distribution of federal funds. Titles VI and IX clearly contemplated application of their provisions to aid distributed by an intermediate recipient (i.e., a state program) to institutional recipients or individual beneficiaries. In that sense, 34 C.F.R. §106.2(h) (1982), regulating federal financial assistance extended through a recipient to an educational program or activity, is consistent with the language of Title IX. The regulation is inconsistent with the statute, however, to the extent that it equates the individual beneficiary of federal assistance (here the students) with an intermediate recipient for the purposes of applying Title IX to expenditures of federal grants by beneficiaries. Under Title VI regulations, such an equation cannot be made because the definition of "recipient" excludes the "ultimate beneficiary under any program." *See* 34 C.F.R. §100.13(i)(1982). Title IX regulations generally duplicate the Title VI regulations' definition of recipient except that the phrase "excluding ultimate beneficiaries" is eliminated. Compare *Id*, with 34 C.F.R. §106.2(h)(1982). Failure to exclude ultimate beneficiaries from the definition of "recipient" renders the Title IX regulation fatally inconsistent with Congressional intent. *See* Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof,' " 78 *Mich.L.Rev.* 608, 615-17 (1980).

[5]The BEOG awards at issue here are $408.00 for Petitioner Sickafuse and $654.00 for Petitioner Hockenberry. (JA 62-63).

gives an institution funds to build a chemistry building.[6] When students pay for tuition or college charges, value is exchanged for value. Any benefit derived by the institution is indirect and tangential, identical to that derived through the attendance at the institution by anyone supported by welfare, social security, or other government entitlement payments.[7]

Nor, as the government contends (Govt. Br. at 18), can direct grants to students be viewed as a subsidy for the College's financial aid program. The legislative history demonstrates the contrary. (Pet. Br. at 26). Congress created the separate, federal BEOG program to complement existing private scholarships, not to supplant them. When the Education Amendments of 1972 were enacted, colleges whose students received the grants were required to maintain their level of scholarship funding. *See* 20 U.S.C. §1088(c).[8] Thus, institutional funds were not to be released for other uses, but students were to receive the benefits of an additional, separate, federal scholarship program.

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[6]When an institution itself agrees to administer a federal assistance program, a transaction of a third kind is created and the incidental economic benefit to that institution (or a state or local agency filling that role) is irrelevant. It is subject to Title IX regulation because it has agreed to conduct a program funded by federal dollars.

[7]Despite the government's equation of institutional assistance to student tuition payments, the fact is that the Title IX regulations exempt analogous market transactions from their definition of "Federal financial assistance." 34 C.F.R. §§106.2(g)(2) and (4)(1982). The Department regulations have thus correctly excluded market transactions other than students' use of direct federal grants. Similarly, Title IX has never been held to apply to procurement contracts where the federal government itself engages in market transactions. *Cf.* 110 Cong. Rec. 10076 (1964).

[8]This maintenance of effort provision was repealed in 1980. *See* P.L. 96-374.

When creating a student assistance program, Congress intended to preserve the distinction between federal assistance extended to individual beneficiaries through state agencies or private entities and federal assistance extended directly to individual beneficiaries. As in earlier federal student assistance programs, institutions could elect to participate in the program by administering and disbursing federal student assistance funds. When they so participate, they have the capacity to discriminate within the program. When students receive the assistance directly from the federal government, however, there is no action by any intermediary with any capacity to discriminate in the federal assistance program. Only the federal government has the power to discriminate in making these direct awards. Congress intended Title VI and Title IX to apply only where institutions had the power to discriminate in a federal program. Where they did not, no application was intended.

Congress intended that an educational institution's operation of federal student assistance programs that distribute and administer federal funds, such as campus-based student grant and loan programs, justifies the *quid pro quo* of Title IX regulation over those programs. An institution's control over the use of federal dollars constitutes the permissible basis for regulation. Incidental benefit should not be an excuse for regulating truly private activities. Where a college, for entirely legitimate reasons, refuses to participate in a federal program, but the government nonetheless distributes grants to students who happen to attend that institution, the institution was not assigned the same status as one which voluntarily entered into

the assistance relationship with the government and which enjoys the ability to control assistance funds.[9]

POINT II

The government's interpretation of Title IX violates the statute's program-specific requirement.

Assuming, despite Grove City's argument to the contrary, that the College receives federal assistance through the BEOG program, what is the permissible scope of regulation? The answer is found by examining the purpose and scope of the federal program itself. Congress intended that colleges operating the BEOG program do so in a nondiscriminatory manner. *See Hillsdale College v. Department of Health, Education and Welfare*, 696 F.2d 418, 430 (6th Cir. 1982), *pet. for cert. pending*, No. 82-1538. Faced with the reality that imposing such a requirement on Grove City would be meaningless — because Grove City plays, at most, a de minimis role in

[9]The legislative history cited by the government (Govt. Br. at 20-31) is not contrary. Despite its contention that no change in the concept of recipient was intended from Senator Bayh's original 1971 non-discrimination proposal to his 1972 non-discrimination proposal, which was modeled on Title VI, the government supplies no authority for this proposition. It instead supplies extensive history on an issue that Grove City does not dispute — that Congress was concerned that institutions administer and distribute funds from *federal* student aid programs in a nondiscriminatory manner. Thus, when colleges choose to administer and distribute federal student assistance, Title IX regulation should apply to those programs and activities. The Title IX legislative history, aside from Bayh's statement that Department regulation would not be directed at assistance received by individual students (117 Cong. Rec. 30408 (1971)), supplies no clear resolution of the meaning of recipient under Title IX when the institution plays no role in the administration or distribution of the federal student assistance program. We contend that recourse to Title VI legislative history is necessary to determine the scope of "receiving Federal financial assistance" and that the history demonstrates congressional intent to exclude the types of direct student grants at issue here. *See* Pet. Br. at 28-33. Claims of what the legislative history "really was" by the amicus senators and representatives are suspect. Only 10 of the 50 members of Congress listed as amici served in the Congress which enacted Title IX; none played an important role in its passage.

the government's administration of the BEOG program — the government finds it necessary to expand the concept of "program or activity" to encompass the College's entire financial aid program. Govt. Br. at 16. Even though Grove City's financial aid program neither receives, disburses, nor administers federal student assistance dollars, the government claims a right to regulate that program, "including any financial aid dispensed from non-federal funds." *Id.* This expansion of "program or activity" is not significantly different from the Department's now discarded institution-wide interpretation of Title IX that the Third Circuit adopted. The Department's interpretation of program or activity is as troublesome and elusive as that which defines the entire institution as a program. The logical problems inherent in this interpretation of "receiving Federal financial assistance" support Grove City's position that it conducts no program receiving federal assistance.

During congressional debates, Congress referred to the particular underlying grant statutes as the "programs or activities" subject to regulation under Title IX. *See Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969). While the scope of Title IX regulation may vary depending upon the nature and purpose of the federal program involved,[10] where the entire purpose of a federal

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[10] In one example listed by the government (Govt. Br. at 19, n.23), the purpose of the grant statute, i.e., to aid a college's chemistry program, is broader than that involved in the present case. In that situation, the scope of Title IX regulation may properly extend beyond the administration or handling of federal dollars to the components of the chemistry program itself. Another grant statute with a potentially broader scope is that providing general federal impact aid to elementary and secondary schools. *See* 20 U.S.C. §§ 236-44. In the present case, however, the purpose of the BEOG program is to distribute federal dollars for use by individual student beneficiaries. Here, the program-specific scope of Title IX regulation must be limited to the intermediate recipient's participation in the administration and disbursement of those funds, subject always, to the caveat that discrimination by the recipient may be shown to infect the administration or disbursement of the funds and thus impact discriminatorily and hence illegally on the intended beneficiaries of the program. *See, e.g., Rice v. President & Fellows of Harvard College*, 663 F.2d 336, 339 n.2 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

program is to distribute federal dollars to needy students, Title IX regulation cannot, consistent with its program-specificity requirement, extend to the entire spectrum of private loans, private scholarships, or student work opportunities that constitute an institution's financial aid program. Where an institution plays no role in administering or disbursing federal dollars, there can be no principled basis for regulating its administration and disbursement of private funds.

Contrary to the arguments of some amici, this interpretation does not spell the end for the progress Title IX has made in eliminating sex discrimination. Restricting the presumptive scope of Title IX regulation to an institution's programs or activities that are directly funded by the government will not create the compartmentalized discrimination feared by some amici. *See* Brief, *amicus curiae*, of American Asssociation of University Women, *et al.*, at 28. If discrimination outside a funded program infects beneficiaries' participation in the federal program, that program cannot be said to be free from unlawful discrimination. *See* Pet. Br. at 20, n. 18. To determine if a federally funded program is infected requires a fact-specific investigation, and, if infection is found, appropriate remedies. But these issues are not before the Court in this case since the record here reveals not even a hint of discrimination at Grove City. The issue of compartmentalized discrimination thus need not be addressed here.

POINT III

The Assurance of Compliance may not be saved by now interpreting it in a program-specific manner.

The government has retreated from its former interpretation of the Department's assurance requirement, claiming now that assurances "must . . . be written and construed in a program-specific manner." (Govt. Br. at 43). Despite this reversal of its position, a position never presented to the court of appeals or,

indeed, to the College, the government asks this Court to affirm the Third Circuit's judgment. Affirmance would terminate grants to Grove City students solely because the College refused to sign an overly broad Assurance which was not program-specific.

The government attempts to escape the implications of its change in position by quoting limiting language in the Assurance and implementing regulations, claiming that the Assurance may now be saved by applying retroactively a new, more limited interpretation. For this lawsuit and the Assurance form involved in it, however, the government is bound by its prior interpretation of the Assurance, at least insofar as it seeks to impose the funds-termination penalty endorsed by the court of appeals. If the government truly rejects an institutional application of the Assurance, it should also urge this Court to reverse the judgment below. An affirmance would enforce an interpretation of the Assurance "rejected by this Court and the Department and out of step with the language of the statute." (Govt. Br. at 43). It would also unfairly punish students despite the conceded invalidity of the Assurance.[11]

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[11]Contrary to the government's position (Govt. Br. at 48, n.57), its recognition that the prior Assurance requirement was overly broad is also an admission that its earlier Assurance violated its duty to state unambiguously the conditions it seeks to impose on the receipt of federal funds. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). It is outrageous for the government to contend that Grove City, which brought the erroneous position to the government's attention, should be punished for its foresight.

POINT IV

Federal funds may not be terminated absent a finding of actual discrimination.

Grove City maintains that the government cannot terminate the funds given to some of its students simply because it refused to sign an overly broad assurance of compliance. The District Court agreed, noting that no one was accusing the College of discrimination. The government's response misses the mark. In lengthy discourse, it defends the Department's right to promulgate an assurance of compliance requirement. Govt. Br. at 43-47. Then, without contesting the evidence of contrary congressional intent produced by Grove City (Pet. Br. at 42-47), the government concludes that once its ability to promulgate an assurance regulation is upheld, the remedy imposed for violation of the regulation must also be upheld. But Grove City does not contest the government's power to require a properly limited assurance of compliance from those educational institutions lawfully subject to Title IX. Rather, it challenges the propriety of the funds termination remedy when the assurance is not properly limited and where no discrimination is alleged or proved. The government recognizes that a termination remedy will punish innocent students, but contends that "Congress determined that such a remedy was appropriate in order to insure that federal funds were not used to support discrimination." (Govt. Br. at 45-46, n.53). That is precisely Grove City's point. Congress determined that the termination remedy was appropriate only in cases where discrimination was present. *See* Pet. Br. at 44-47. Where actual discrimination was not present, Congress provided for other, less drastic enforcement mechanisms, including those of contempt and injunction. *See* 20 U.S.C. §1682.

The government cites *Gardner v. Alabama*, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968), to support its position. To the extent that case is relevant, it supports Grove

City's position, not the government's. In *Gardner*, the Fifth Circuit upheld a funds-termination remedy because federal funds were being used to support conceded discrimination. Thus, no authority exists to counter the unambiguous legislative intent that establishes that funds termination was intended to be a last-resort remedy imposed only after a finding of actual discrimination. The legitimacy of an assurance of compliance requirement is irrelevant to this issue. The remedy chosen to enforce that requirement, however, must be consistent with Congress' clear intention. By limiting funds termination to cases of actual discrimination, Congress intended to protect innocent beneficiaries from termination of their benefits.

Conclusion

Grove City College does not seek to attack Title IX, a statute whose purpose the College supports. Nor does the College discriminate in its practices or relationships with students, faculty or staff. The record contains not even an allegation that this College has discriminated or seeks any right to discriminate. Rather, Grove City protests expansion of the bureaucratic machinery which claims the power to regulate an entire college despite its deliberate and consistent refusal to accept even one dollar of federal or state aid. Receipt and use of federal entitlement grants by some students simply was not intended by Congress to subject a college to federal regulation under such circumstances, and this Court should reject the Department's attempt to expand its authority to do so. The judgment of the Court of Appeals should therefore be vacated.

Dated: November 18, 1983

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